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No. 89-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC., THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF THE LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, and WILLIAM W. SHAFFER,
Respondents.

Response of Respondent, Official Committee of Equity Security Holders, in Opposition to Pension Benefit Guaranty Corporation's Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTIONS PRESENTED

The LTV Corporation ("LTV Corp.") and its subsidiary, LTV Steel Company, Inc. ("LTV Steel") (collectively, "LTV"), are business entities attempting to reorganize under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (West 1979 & Supp. 1989), in part because of the extreme burden placed upon their operations by unfunded pension liabilities. Respondent, Official Committee of Equity Security Holders ("Equity Committee"), is an official committee duly appointed in the LTV reorganization cases to represent the interests of some 90,000 shareholders.

Pension Benefit Guaranty Corporation ("PBGC") is a wholly owned United States government corporation, established pursuant to Section 4002 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1302, to administer the pension plan termination insurance program under Title IV of ERISA, 29 U.S.C. § 1001 *et seq.* (West 1982 & Supp. 1986).

After LTV filed for bankruptcy, the Internal Revenue Service ("IRS") refused to grant LTV a waiver of its pension plan funding obligations for 1985 and revoked a similar waiver for 1984. Subsequently, PBGC determined that LTV would be unable to fund its pension plans on a long-term basis, and terminated the three plans at issue effective January 13, 1987. Under the threat of a crippling strike, LTV Steel negotiated a new collective bargaining agreement granting some additional pension benefits for the duration of the reorganization. Despite the bankruptcy court's approval of this agreement, PBGC ordered the original pension plans restored to pretermination status on September 22, 1987. PBGC never explained how it determined that LTV Steel's financial condition had improved and never withdrew its prior conclusion that LTV Steel was incapable of funding the plans on a sustained, long-term basis. The questions presented are:

1. Should this Court grant the petition for certiorari when PBGC has failed to demonstrate that the existing assets of the three terminated LTV Steel pension plans are not capable of paying PBGC-guaranteed benefits under the Plans so that there is no economic justification for certiorari?

2. Should this Court grant the petition for certiorari when PBGC has failed to demonstrate that improvement of LTV Steel's financial circumstances between January, 1987, when PBGC had concluded that LTV Steel had no prospect of funding its plans on a long-term basis, and September, 1987, when PBGC ordered restoration, justified restoration of the plans?

3. Should this Court grant the petition for certiorari when PBGC has failed to demonstrate that LTV Steel's establishment of interim plans, for reasons of compelling economic necessity, pursuant to a collective bargaining agreement and bankruptcy court approval, is grounds for restoration of the original plans despite PBGC's failure to reverse its prior finding that the LTV Steel pension plans could not be funded on a long-term basis?

4. Should this Court grant the petition for certiorari at this time despite PBGC's failure — indeed refusal — to comply with the minimal procedures mandated by the Administrative Procedure Act, ("APA"), 5 U.S.C. § 551 *et seq.* (West 1982 & Supp. 1989), before reaching the conclusion that restoration of the plans was proper because of improvements in LTV Steel's financial circumstances?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit in *Pension Ben. Guar. Corp. v. LTV Corp.*, is reported at 875 F.2d 1008 (2d Cir. 1989), and is reprinted at pp. 1a-27a of the Appendix to PBGC's Petition for Writ of Certiorari. The judgment of the United States District Court for the Southern District of New York, docketed September 13, 1988, from which appeal was taken, and the opinion of

the District Court, dated June 22, 1988 and reported at 87 B.R. 779, are reprinted at pp. 28a-131a of the same Appendix.

JURISDICTION

The PBGC invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves sections 4002, 4042 and 4047 of ERISA, 29 U.S.C. §§ 1302, 1342 and 1347.

STATEMENT OF THE CASE

This case concerns the ongoing effort of LTV, its creditors and equity holders to restructure LTV's obligations — including its pension obligations — in a Chapter 11 case under the United States Bankruptcy Code.

PBGC's petition for certiorari would have this Court accept on faith the unproven premise that denial of the writ will create a national calamity — in which major corporations will routinely shift the burden of supporting their unfunded pension liabilities onto the back of PBGC — thereby causing a liquidity crisis for the insurance fund created by Congress to provide some pension coverage for workers left out in the cold when their employers closed their doors without funding their pension plans. Nothing in the record supports that view.

The problem of follow-on pension plan abuse arises when a healthy, solvent employer, having terminated a plan voluntarily, thereby triggering PBGC's pension insurance program, then offers a supplemental wrap-around retirement arrangement to its employees, with the result that they receive substantially the same benefits as were provided by the old

plan, partially paid for by PBGC. In such a case, PBGC is forced to fund an ongoing retirement program of a healthy business.

This case presents a problem PBGC has never addressed previously and has been unwilling to consider in a responsible manner throughout this action. That problem is whether a company like LTV Steel, compelled by economic necessity to seek bankruptcy court protection in order to confront its many financial problems and the burden of its pension obligations, can be found to have established abusive follow-on plans, if, after the original plans were involuntarily terminated, the company agreed to establish an interim plan limited to the duration of the reorganization. LTV Steel's interim pension plan was part of a collective bargaining agreement negotiated under the threat of a strike that would affect its ability to reorganize and was approved by the bankruptcy court. PBGC has promulgated no regulations applicable to this situation, has issued no relevant opinion letters and, in fact, has refused to recognize the problem once it arose.

The issues raised by PBGC's petition for certiorari do not warrant judicial review at this time. The principal argument for granting certiorari is the alleged threat to the federal premium insurance program caused by the insistence of the Courts below that PBGC adhere to the minimum requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.* (West 1982 & Supp. 1989), in making its determination to restore the plans in question. PBGC would thrust upon this Court for review, prematurely in the opinion of the Equity Committee, its claim that its discretion to restore a previously terminated pension plan is practically boundless and that any judicial intervention to enforce minimal standards of fairness is an unwarranted interference with the agency's pursuit of the statutory goals of ERISA.

Facts and Proceedings

On or about July 17, 1986 (the "Petition Date"), LTV Corp. and sixty-six related affiliates, including LTV Steel, filed petitions for reorganization under Chapter 11 of Title 11, United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York. These cases were assigned to the Honorable Burton R. Lifland, Chief Judge of that Court. The cases have been consolidated procedurally and are being jointly administered pursuant to an order of the Bankruptcy Court.

The principal reason given by the Debtors for filing the Chapter 11 petitions was the need to resolve their multi-billion dollar pension liability problem. As of the Petition Date, LTV Steel was the plan sponsor of four single employer, defined benefit pension plans (the "Plans"), as defined by ERISA. LTV Corp. was the plan administrator of the Plans, as defined by ERISA, 29 U.S.C. § 1002.

Almost immediately after LTV filed its Chapter 11 petitions, PBGC became an active and necessary player in the drama. LTV Steel took the position that its bankruptcy filing prevented it from making pension plan payments except by order of the bankruptcy court because such contributions would otherwise constitute an improper payment of prepetition debts. As a result, on August 28, 1986, LTV Steel applied to the Internal Revenue Service ("IRS") for a waiver of its minimum annual pension funding obligations in the amount of $215 million for the four LTV Steel Plans for the plan year ending December 31, 1985. On September 30, 1986, the District Court entered an order, with the consent of LTV, terminating one of the Plans pursuant to the involuntary termination provisions of ERISA, 29 U.S.C. § 1342. The terminated Plan is not at issue in this case.

In November, 1986 the IRS, after consultation with PBGC, denied LTV Steel's funding waiver requests for the three remaining Plans for the plan year 1985 in the amount of $205 million, and revoked the previously granted waiver for plan year 1984 in the amount of $175 million.

On December 15, 1986, PBGC staff personnel in the form of a "SEPPAA Trusteeship Working Group" met to determine whether to terminate the three remaining Plans involuntarily because of (1) the denial (in which PBGC had played a role) of funding waivers by the IRS which left the Plans in violation of the minimum funding standards; and (2) the views of Mr. Mike Wells, Associate Director, Insurance Operations Department and senior financial person for PBGC that "*the probability that LTV can survive with the Plans intact is 'de minimis.'*" (emphasis added) (Respondent's App. p. 10a)

PBGC's Working Group met twice more on December 18, 1986 and January 5, 1987, and recommended involuntary termination of the three Plans to the agency's Executive Director, after the Group concluded that "LTV could not afford to maintain the plans," and that a projected and optimistic $300 million cash flow per year and a "cash build up of just over $1 billion by the end of 1988 *would not be sufficient to finance a plan of reorganization and the ongoing Plans.*" (emphasis added). The group's conclusion was that the termination must occur "now or later." (Respondent's App. p. 10a)

On January 12, 1987, the District Court entered orders terminating the Plans pursuant to the involuntary termination provisions of ERISA, 29 U.S.C. § 1342. As a result of the terminations of the Plans, PBGC became the statutory guarantor and trustee of each Plan, and was vested with complete authority and control over the administration of each Plan. PBGC also became liable for funding the payment of a portion of the non-forfeitable benefits due beneficiaries under the Plans.

The United Steelworkers of America ("USWA" or "Union"), the collective bargaining representative for hourly-paid employees of LTV Steel, strenuously objected to termination of the two plans for hourly employees and to the resulting reduction in benefits paid to its members. The Union unsuccessfully appealed the termination orders and also filed suit in the bankruptcy court on January 16, 1987, seeking to obtain payment of benefits under the Plans on the grounds that the reduction in pension benefits constituted a breach of the existing collective bargaining agreement between the Union and LTV and section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113. The Union also threatened a strike if its demands remained unsatisfied. Fearing that a strike would paralyze the debtors early in their reorganization effort, and prepared to alleviate some of the hardships imposed on active and retired employees, LTV Steel took the steps needed to address the Union demands, including the negotiation of an interim collective bargaining agreement. LTV Steel obtained bankruptcy court approval to make a single hardship payment to retirees affected by the Plan terminations. Additionally, LTV Steel and the Union entered into a modified collective bargaining agreement to remain in effect only until a plan of reorganization for LTV Steel was confirmed (the "Interim Agreement"). The Interim Agreement resolved the Union's lawsuit by granting its members some additional pension benefits. Over the objection of PBGC, a voluntary and active participant in the bankruptcy proceedings, the Interim Agreement was approved by the bankruptcy court on July 30, 1987. The bankruptcy court, the District Court and the Court of Appeals denied PBGC's applications to stay the implementation of the Interim Agreement.

Immediately thereafter, PBGC asserted that the benefit plans provided by the Interim Agreement were nothing more than abusive "follow-on" plans that allowed LTV Steel to offer as high a level of benefits to present and former employees as had been provided by the terminated Plans while shifting a substantial portion of the costs to PBGC. On August 12, 1987, the SEPPAA Trusteeship Working Group, without a formal hearing, issued a recommendation to the Executive Director of PBGC that the three LTV Steel Plans be restored to prevent the so-called abuse of the pension insurance program. This recommendation was based upon the Working Group's conclusions that: (1) LTV Steel had established abusive follow-on plans which provided substantially the same benefits to present and former employees as the terminated Plans and were partially funded by PBGC; (2) the improvement in LTV Steel's financial position in the six months since termination of the three Plans at issue justified restoration; and (3) LTV had demonstrated a willingness to fund its employee retirement Plans.

These conclusions contain obvious substantive and procedural problems for PBGC. First, the finding of improvement in LTV's financial position was a dramatic turn-around from PBGC's conclusion, when the Plans were terminated only six months earlier, that LTV lacked the long-term capacity to fund them. Second, PBGC never acknowledged any responsibility to work within the bankruptcy framework to assist plan beneficiaries while a court-supervised reorganization was in progress and never explained how the Interim Agreement was "abusive" or how PBGC's long-run financial concerns had been dispelled by LTV's sudden, short-term improvement. Before making a decision, the Executive Director consulted with the Board of Directors of PBGC which upheld the authority of the Executive Director to determine when particular plans should be restored.

On September 22, 1987, PBGC issued a notice of restoration, pursuant to ERISA section 4047, ordering the restora-

tion of three of the terminated LTV Steel Plans to their pretermination status. PBGC commenced this lawsuit to enforce its notice of restoration on October 9, 1987, in the United States District Court for the Southern District of New York. LTV then brought an action in the bankruptcy court alleging that restoration violated the automatic stay provision of the bankruptcy code, 11 U.S.C. § 362(a). The District Court granted PBGC's motion to withdraw LTV's action from the bankruptcy court and considered both actions together.

The District Court denied PBGC's motion for summary judgment on June 22, 1988, and by judgment dated September 7, 1988 vacated PBGC's notice of restoration and remanded to PBGC for further proceedings. While the District Court upheld the power of PBGC to restore previously terminated plans, the Court ruled that the agency had acted arbitrarily and capriciously in failing to observe the standards of the APA. The Court, in effect, drew a roadmap for the agency outlining the steps in plan restoration.

Instead of accepting the remand, PBGC appealed to the Second Circuit. On May 12, 1989 the Court found that PBGC exceeded the bounds set by statutory procedures and permissible discretion because (1) PBGC could not restore the LTV Steel Plans solely by claiming that the Interim Agreement with USWA set up abusive follow-on plans; and (2) PBGC could not ignore the minimal procedures mandated by the APA in making the factual findings of improved economic circumstances and in failing to consider the impact of central policies of federal bankruptcy and labor laws applicable to this bankruptcy reorganization in reaching its decision. The Court of Appeals also drew a roadmap outlining the steps in plan restoration for the agency. Fifteen months after the District Court decision, PBGC still refuses to accept the remand and has filed this petition for certiorari.

In all, this petition presents nothing more dramatic than a federal agency that has failed to follow the procedures required of it by the APA, and that has been told by two United States Courts to "go back and do it right." In the face of contrary precedent, and having failed totally to demonstrate any economic harm that will result from the remand, PBGC continues to argue, unpersuasively, that it does not have to abide by fundamental statutory standards.

THIS COURT SHOULD DENY THE WRIT OF CERTIORARI SOUGHT BY PBGC

1. PBGC Has Presented No Evidence Of Compelling Economic Necessity Justifying The Granting Of Certiorari At This Time

PBGC's petition conjures up a misleading sense of urgency surrounding the proceedings. PBGC has presented no evidence to support its assertion that it will suffer calamitous losses if certiorari is denied at this time. Indeed, PBGC has not even made the minimal showing that the Plan assets in large measure will not carry the Plans through the period of remand and permit payment of benefits. Neither has it shown what the real cost to the insurance fund will be if it is temporarily required to fund a portion of LTV Steel Plan liability. The two billion dollar figure PBGC cites in its brief is not the cost of projected PBGC outlays during remand, but instead the present value of PBGC's projected payment stream for the remainder of the lives of participants in the three pension plans, over many decades after a plan of reorganization presumably would have been confirmed. Because PBGC has failed to present any "special and important reasons" as required for certiorari by Supreme Court Rule 17, this Court should deny PBGC's petition.

2. Certiorari Is Not Justified At This Time Because PBGC Failed To Consider All Relevant Factors Before Deciding That Improved Financial Circumstances Justified Restoration Of LTV Steel's Plans

PBGC is not entitled to certiorari at this time because it has failed, and since the District Court decision, indeed refused, to make the administrative findings necessary to support a decision to restore the Plans based upon LTV Steel's changed financial circumstances. 875 F.2d at 1020. The consequence of PBGC's refusal to make the required analysis is that this Court is being asked to grant certiorari solely so that PBGC does not have to do that which it is statutorily required to do.

The Equity Committee does not contest PBGC's power to restore a previously-terminated pension plan upon a showing of changed financial circumstances under ERISA section 4047, 29 U.S.C. § 1347. However, PBGC cannot seriously dispute that it is an administrative agency subject to the provisions of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (West 1982 & Supp. 1989), and that it is not free to act on a whim. *See, e.g., Belland v. Pension Ben. Guar. Corp.*, 726 F.2d 839, 844 (D.C. Cir.), *cert. denied*, 469 U.S. 880 (1984); *A-T-O, Inc. v. Pension Ben. Guar. Corp.*, 634 F.2d 1013, 1019 n.10 (6th Cir. 1980); *Pension Ben. Guar. Corp. v. Hathaway Machinery Co.*, 566 F. Supp. 1223, 1224 (D. Mass. 1983). The Equity Committee position below was essentially accepted by both courts, each of which ruled that the agency could not restore the terminated Plans without following procedures mandated by the APA, and without giving due regard to the applicable provisions of federal bankruptcy and labor law as well as ERISA.

Decisions by PBGC, including decisions to restore plans pursuant to 29 U.S.C. § 1347, are subject to judicial review under

the arbitrary and capricious standard found in 5 U.S.C. § 706(2)(a), *Belland*, 726 F.2d at 844. In applying this standard, a court must decide whether PBGC's decision was based upon consideration of all the relevant factors and whether PBGC followed necessary procedural requirements. *See, e.g., Marsh v. Oregon Natural Resources Council*, ___ U.S. ___, ___, 109 S. Ct. 1851, 1861 (1989) ("the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment'") (citation omitted); *Bowman Transp. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) ("The agency must articulate a 'rational connection between the facts found and the choice made'"); *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The Court of Appeals adopted the position of the Equity Committee and correctly recognized that PBGC had failed, indeed refused, to consider many centrally relevant factors prior to reaching its hasty decision to restore the LTV plans. Most significantly, the Court of Appeals rejected PBGC's claim that it need not consider the policies of federal labor law and federal bankruptcy law implicated by its actions. 875 F.2d at 1016. Given that the legislative history of ERISA section 4047 demonstrates conclusively that changes in financial circumstances were the central factor for determining when restoration should be ordered, and given PBGC's ongoing voluntary participation in the bankruptcy proceedings, it is difficult to see how consideration of LTV's bankruptcy filing and the policy concerns of bankruptcy law could be ignored by the agency.

In rejecting PBGC's finding that LTV Steel's changed financial circumstances justified restoration of the Plans, the Court of Appeals identified several significant deficiencies in PBGC's administrative record including: (1) a summary financial analysis

that reviewed LTV's income trend only for a five month period; (2) PBGC's assumption that LTV would be able to obtain funding waivers from the IRS for the years 1984 through 1986 and after, despite the fact that the IRS had *denied* LTV's request for a waiver for 1985 and had revoked a waiver for 1984; (3) PBGC's assumption that pension savings based upon job reductions in the interim agreement would be preserved in future labor agreements when the Union would be less likely to grant such concessions; and (4) PBGC's complete failure to assess the impact of LTV's status as a Chapter 11 debtor on its financial condition. The Court of Appeals criticized PBGC for focusing on LTV's short-term economic conditions, without considering the long-term implications of plan restoration, including the likelihood of retermination. 875 F.2d at 1020.[1]

Procedurally, the Court of Appeals identified three different failures by PBGC, any one of which, by itself, rendered PBGC's decision arbitrary and capricious: (1) PBGC's failure to apprise LTV Steel of the material on which it based a decision; (2) PBGC's failure to give LTV an opportunity to offer contrary evidence; and (3) PBGC's failure to proceed in accordance with ascertainable standards. 875 F.2d at 1021 (citing *Bowman Transp. v. Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 288 n.4 (1974) ("A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that [it] may rebut it").)

[1]PBGC contends, in the alternative, that the respondents sought, and the Court of Appeals awarded, some sort of measure of review in excess of that provided by the APA. This claim is incorrect. PBGC's reliance on this Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), is inappropriate in this regard because: (1) this Court was formulating standards of review applicable solely to rulemaking under 5 U.S.C. § 553; and (2) this Court did not address an agency's failure to prepare an administrative record sufficient to satisfy the arbitrary and capricious standard.

That the Court of Appeals was correct in concluding that PBGC acted in an arbitrary and capricious manner can be seen from the fact that PBGC did not even consider any alternatives to full and immediate restoration of the LTV Steel Plans, despite the fact that ERISA section 4047 expressly provides for "such action as may be necessary . . . including, but not limited to, the transfer to the employer . . . of control of part or all of the remaining assets and liabilities of the plan." PBGC's actions in this case in examining LTV's income trend for a mere five months also are inconsistent with earlier PBGC opinion letters addressing proposals for plan restoration. PBGC has consistently required the plan sponsor to demonstrate the long-term capacity to fund the plan and avoid the necessity for retermination. *See, e.g.*, PBGC Opinion Letter 83-5 (February 2, 1983) (LEXIS, Labor library, PBGC file) ("The Company agrees that it will not . . . terminate the Plan for at least five years after the date of the restoration of the Plan"); PBGC Opinion Letter 82-11 (April 1, 1982) (LEXIS, Labor library, PBGC file); PBGC Opinion Letter 77-132 (February 18, 1977) (LEXIS, Labor library, PBGC file). *See also I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("[a]n agency interpretation . . . which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view").

Given the numerous centrally relevant issues on which PBGC failed — and has consistently refused — to develop an administrative record before ordering restoration of the three LTV Steel Plans on the basis of improved economic circumstances, no purpose would be served by granting certiorari at this time. The Court of Appeals requires PBGC to do nothing more than carry out its statutory responsibilities, including the preparation of a complete administrative record, prior to rendering a decision neither court below denies it the general authority to make. Given the absence of any impen-

ding fiscal crisis at PBGC, a grant of certiorari would serve only to allow the PBGC to escape its statutory responsibilities once again.

3. Certiorari Is Not Appropriate Given PBGC's Failure To Demonstrate That LTV Steel's Actions Amount To Follow-On Plan Abuse

Certiorari is inappropriate at this time, given PBGC's failure to demonstrate that LTV Steel's actions constitute an abusive follow-on plan. The Court of Appeals concluded, "PBGC offers no detailed comparison of the two sets of plans to support its conclusion that the [Interim Agreement was] merely a continuation of the old Plans." 875 F.2d at 1017. This failure, indeed refusal, by PBGC ensures that any review of this question by this Court will be conducted without the benefit of the factual record necessary to support the central, novel contention PBGC makes in this case, namely whether a reorganizing debtor's interim pension plan, established after termination of preexisting plans, pursuant to a collective bargaining agreement and bankruptcy court approval, constitutes an "abusive follow-on plan." Certiorari at this time would allow PBGC the luxury of making this claim without performing the analysis it is required by law to perform. This Court should not permit PBGC to avoid its statutory responsibility.

4. Even If, *Arguendo,* The Court Of Appeals Erred In Holding That LTV Steel's Establishment Of An Interim Benefit Plan Did Not Constitute Grounds For Restoration Of The Original Plans, Certiorari Would Be Inappropriate

Assuming, *arguendo*, that the Court of Appeals erred in concluding that the language of ERISA section 4047, 29 U.S.C. § 1347, does not permit PBGC to base a restoration decision

on the establishment of follow-on Plan abuse, which it did not do, nevertheless, certiorari should be denied.

Given PBGC's refusal to develop a proper administrative record in support of either one of the claimed bases for restoration, and PBGC's complete failure to demonstrate that any financial calamity would befall the agency should the Plans remain terminated during the remand period, the Court of Appeals' ruling that LTV's establishment of an interim plan does not constitute grounds for restoration provides no basis for certiorari at this time. Even if the Court of Appeals is wrong, review of this question can await completion of the factual record, by which time further review of this issue might well be unnecessary. Perhaps more significantly, this ruling by the Court of Appeals seems well-founded.

Congress has not directly spoken to the question of whether the establishment of a follow-on plan is a basis for restoration. 875 F.2d at 1017. Under section 4047, restoration of a terminated plan:

> . . . is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

29 U.S.C. § 1347.

However, Congress has provided guidance in the legislative history, and that legislative history is consistent with the Court of Appeals' ruling and contrary to PBGC's asserted justification. In speaking to abusive follow-on plans, Congress was concerned that solvent, healthy employers might promise to

increase plan benefits while leaving PBGC to finance such benefit increases for an indefinite period. To the contrary, in situations such as the present one, Congress "[a]cknowledg[ed] that employers on the verge of bankruptcy would be unlikely to terminate pension plans solely to take advantage of termination insurance. . . ." *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 367 n.12 (1980) (quoting *Nachman Corp. v. Pension Ben. Guar. Corp.*, 592 F.2d 947, 963 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980)). The Court of Appeals recognized that Congress acknowledged that the situation in this case, in which an interim plan is approved by the bankruptcy court solely to further the reorganization effort, is not an abusive follow-on plan. 875 F.2d at 1016-17. Indeed under the very PBGC precedent relied upon to restore the Plans, the so-called follow-on plans of LTV were *not* abusive.

Furthermore, Congress never intended that restoration be ordered as a response to creation of follow-on plans. 875 F.2d at 1017. Instead, Congress intended for section 4047 restoration to be ordered only when a company's financial circumstances were found to have improved, essentially reversing the statutory grounds for termination: the prospect of an unreasonable long-run loss to PBGC. *Id.* (citing H.R. Rep. No. 1280, 93rd Cong., 2nd Sess., *reprinted* in 1974 U.S. Code Cong. & Admin. News 5038, 5158). Congress continued this policy choice when it enacted the SEPPAA amendments to ERISA, Pub. L. No. 99-272, title XI, 100 Stat. 237 (1986), and once again did not consider whether a "follow-on" plan constituted grounds for restoration. *Id.* (citing H.R. Rep. No. 241, 99th Cong., 2nd Sess., pt 2, at 51-55, *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 709-713). Most significantly, the legislative history of the most recent ERISA amendments demonstrates that Congress expressly considered a proposal to make the establishment of follow-on plans

a basis for restoration and *rejected* it. *Id.* (citing H.R. Rep. No. 100-495, 100th Cong., 1st Sess. 874-85, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1245, 2313-1625 to 1631).

PBGC's reliance on its two opinion letters condemning follow-on plan abuse does not support its petition. Both PBGC Opinion Letter 81-11 (May 11, 1981) (LEXIS, Labor library, PBGC file), and PBGC Opinion Letter 86-27 (December 17, 1986) (LEXIS, Labor library, PBGC file), deal with solvent employers attempting to use PBGC to subsidize the cost of ongoing plans for employees of an ongoing business. Both opinions claim, without any significant authority, that Congress intended for section 4047 to be used to remedy follow-on plan abuse. Even if that premise were correct, neither opinion even suggests that the establishment of an interim plan, as an exigency of survival in reorganization proceedings, pursuant to a collective bargaining agreement and under bankruptcy court supervision, by a financially troubled employer and under circumstances where PBGC has determined that continuation of the terminated plan posed a long-run threat to PBGC, is a proper ground for restoration.

After examining the statutory language and legislative history of section 4047 and the prior PBGC letters, the Second Circuit looked to the policies of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (West 1973 & Supp. 1989), favoring the enforcement of collective bargaining agreements and to the right of employees to receive benefits beyond those guaranteed by ERISA. The Court of Appeals reached the unassailable conclusion that benefits not guaranteed by ERISA but provided by the interim agreement did not run afoul of any statutory provisions of ERISA. 875 F.2d at 1017 (citing *Murphy v. Heppenstall Co.*, 635 F.2d 233, 237-39 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982)).

Thus, the Second Circuit did not err in affirming the remand order and holding that PBGC's reading of ERISA section 4047 was unreasonable. Neither the statutory language and legislative history nor the other applicable federal policies embodied in statutory and decisional law support the conclusion that restoration of the Plans in question was appropriate under section 4047. Given PBGC's total failure, indeed refusal, to develop a factual basis for review on either theory it is advancing, the Court of Appeals' ruling provides no basis for certiorari.

5. Remand To PBGC For Further Proceedings Might Obviate The Need For Review By This Court

Before deciding whether or not to grant PBGC's petition for certiorari, this Court should consider the nature of the relief ordered by the Courts below and the possibility that such relief might eliminate the need for further review by this Court. The District Court vacated PBGC's notice of restoration because it could not be upheld on the administrative record and remanded the matter to PBGC. The Court of Appeals affirmed. On remand, PBGC might develop facts in justifying its decision to restore the three LTV Steel Plans on the basis of changed financial circumstances. Such a result would eliminate the need for PBGC to seek review by this Court. On the other hand, should the facts fail to demonstrate that changed economic circumstances support restoration of the LTV Steel Plans on remand, both the issues of the proper statutory standard for plan restoration and the adequacy of the agency's record would be appealable. Accordingly, interests of judicial economy and efficiency favor denial of PBGC's petition for certiorari at this time.

6. The Court Of Appeals Acted Correctly In Reviewing The Actions Taken By PBGC

In petitioning this Court for certiorari, PBGC argues that the Court of Appeals overstepped the bounds of proper judicial review of PBGC's construction of ERISA section 4047, 29 U.S.C. § 1347. This argument is incorrect.

When reviewing the construction of a federal statute by the administrative agency charged with responsibility for its implementation, this Court has directed that a multi-faceted analysis be conducted:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . Sometimes, the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-844 (1984). Deference will be given to administrative interpretation, where "this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," *Id.* at 845. However, this Court has cautioned that:

> [D]eference is not to be a device that emasculates the significance of judicial review. Judicial deference to an agency's interpretation of a statute "only sets 'the framework for judicial analysis; it does not displace it'". . . . A reviewing court "must reject

> administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."

Securities Industry Ass'n v. Board of Governors of the Federal Reserve System, 468 U.S. 137, 142-43 (1984) (citations omitted). *See, e.g., Bowen v. Georgetown University Hospital*, ___ U.S. ___, ___, 109 S. Ct. 468, 474 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate"); *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, ___, 108 S. Ct. 805, 817 (1988), holding the Interior Secretary's construction of the Flood Control Act of 1944 not "reasonable" ("[T]he Executive Branch is not permitted to administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law.").

In this case, the Court of Appeals concluded that PBGC's construction of ERISA section 4047 was unreasonable and hence not entitled to judicial deference because (1) the creation of an interim benefit plan pursuant to a collective bargaining agreement and subject to approval by the bankruptcy court is not adequate grounds for restoration; and (2) PBGC failed to follow the mandate of the APA and failed to consider all reasonable factors before deciding to restore the LTV Steel Plans pursuant to section 4047. The Court of Appeals' careful review of PBGC's actions in this case demonstrates that certiorari is unnecessary at this time.

CONCLUSION

For the foregoing reasons, the Equity Committee respectfully urges this Court to deny PBGC's petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.

Dated: October 12, 1989.

Respectfully submitted,

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PENSION BENEFIT GUARANTY CORPORATION

82-11

APRIL 1, 1982

REFERENCE:
4047 Restoration of Plans

OPINION:

This is in response to several letters to the Pension Benefit Guaranty Corporation (the "PBGC"), pertaining to the restoration of the referenced pension plan (the "Plan") pursuant to Section 4047 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1347. We have concluded that restoration of the Plan under that section may be proper, and we will provide appropriate assistance to the Plan's administrator in its efforts to restore the Plan.

The relevant facts, as they have been represented to us or as we have otherwise become aware of them, are as follows. The * * * Company adopted the Plan for its employees in 1951. The Plan was a tax-qualified, defined benefit, single-employer pension plan that, on enactment of ERISA in 1974, became subject to the termination insurance provisions of Title IV of ERISA, 29 U.S.C. §§ 1301 *et seq.* On May 10, 1979, at which time the Plan was maintained by * * * Corporation (the "Company"), the PBGC received from the Plan's administrator a Notice of Intent to Terminate the Plan. On September 17, 1981, counsel for the Plan's administrator wrote to the PBGC requesting that the PBGC permit the Plan to be restored, pursuant to Section 4047 of ERISA, 29 U.S.C. § 1347.

We have determined that, if the "Conditions" listed below are fulfilled, the Plan may be restored to its earlier status. On receipt of appropriate assurance that those Conditions will

be fulfilled, we shall accordingly permit the Plan's administrator to withdraw the Notice of Intent to Terminate the Plan.

CONDITIONS

1. The Company and every trade or business under common control with the Company, within the meaning of Section 4001(b) of ERISA, 29 U.S.C. § 1301(b) (the "controlled group"), shall agree that, in the event of a subsequent termination of the Plan or of any successor plan, occurring less than ten years after the date of the Plan administrator's withdrawal of the Notice of Intent to Terminate the Plan, they will pay to the PBGC the excess, if any, of

(a) the current value of the Plan's benefits guaranteed under Title IV of ERISA as of the date of that termination over

(b) the current value of the Plan's assets allocable to such benefits on the date of that termination.

Thus, the controlled group shall be liable to the PBGC for the amount determined under subsection 4062(b) of ERISA, 29 U.S.C. § 1362(b), without regard to the limitation to 30% of the controlled group's net worth provided by paragraph (2) thereof.

2. If the Plan or any successor plan terminates less than five years after the date of the Plan administrator's withdrawal of the Notice of Intent to Terminate the Plan, the Company and the controlled group will pay to the PBGC the greater of

(a) the liability to the PBGC under § 4062(b) of ERISA, 29 U.S.C. § 1362(b), that would have been due the PBGC thereunder for the Plan's termination effective May 20, 1979, computed without regard to the 30% limitation of paragraph 4062(b)(2), 29 U.S.C. § 1362(b)(2), or

(b) the liability determined under Condition 1, *supra*.

3. The Plan shall be amended to provide that, in the event of its termination, any assets not necessary to provide those benefits described in Section 4044(a)(1-6), 29 U.S.C. § 1344(a)(1-6), *i.e.*, any "residual assets" as described in Section 4044(d) of ERISA, 29 U.S.C. § 1344(d), shall be distributed entirely among Plan participants and beneficiaries in accordance with applicable PBGC regulations (currently Proposed 29 C.F.R. §§ 2618.31-32). Such amendment shall not be subject to modification that would permit any payment of residual Plan assets to any person other than a Plan participant or beneficiary, or a successor plan that fulfills all of the Conditions listed herein.

4. No amendment to the Plan or to any successor plan may be adopted which restricts participation rights or accrual of Plan benefits, limits accumulation of service for vesting purposes, or reduces any benefit entitlements under the Plan or the successor plan.

5. All past, present and future service to the Company shall be considered service for the purposes of benefit accrual, vesting, and participation under the restored Plan or any successor plan.

6. Any Plan participant or beneficiary in pay status shall receive the full benefit to which he (she) is entitled under the terms of the Plan or of any successor plan.

7. The Company shall make all contributions to the Plan required under the Internal Revenue Code or under ERISA, as though the Notice of Intent to Terminate the plan had never been submitted. Such contributions shall include, in particular, any appropriate payments due as the result of past funding waivers, and interest thereon.

The above Conditions shall become effective upon the PBGC's written grant of a request by the Plan administrator

for permission to withdraw the previously submitted Notice of Intent to Terminate the Plan. At that time, the parties to the litigation over the Plan's status will take appropriate steps to terminate that litigation.

I trust these suggestions will prove satisfactory. Please feel free, if you have any questions, to contact * * * of my staff at the address above or at (202) 254-3010.

Sincerely
Robert E. Nagle
Executive Director

PENSION BENEFIT GUARANTY CORPORATION

83-5

FEBRUARY 2, 1983

REFERENCE:
4047 Restoration of Plans
4062 Liability of Employer in Single Employer Plans

OPINION:

This responds to your letter in which you, on behalf of * * * Corp. (the "Company"), indicate an interest in restoring the * * * Inc. Retirement Income Plan (the "Plan"). The Plan administrator filed a Notice of Intent to Terminate the Plan on * * *.

In view of the facts and circumstances of this case, including the short period of time between the filing of the Notice and the request for restoration, the PBGC would permit restoration of the Plan if:

1. The Company agrees to reimburse the PBGC for all expenses the PBGC has incurred as a result of the filing of the Notice, including all expenses incurred in determining, filing and litigating bankruptcy claims pertaining to the Plan.

2. The Company agrees that it will not, without PBGC consent, terminate the Plan for at least five years after the date of the restoration of the Plan.

3. The Company agrees that, if the Plan terminates for any reason whatsoever within five years of the date of the restoration of the Plan, the Company will be liable to the PBGC for * * * less the amount of any employer contributions made to the Plan subsequent to the date of the restoration. This liability shall not be limited by the Company's net worth and shall be in addition to the Company's liability: (a) to the PBGC for the

amount of liability, as of the date the Plan terminates, under 29 U.S.C. § 1362; and (b) to the Plan for employer contributions required by statute or by contract. The amount paid to the PBGC under this paragraph shall be credited as an asset of the Plan in determining the amount due under 29 U.S.C. § 1362.

4. The Company agrees that it will continue to fund the Plan in accordance with any contractual obligations to contribute to the Plan and in accordance with the minimum funding standards contained in Section 412 of the Internal Revenue Code (the "Code"), 26 U.S.C. § 412 and in Section 302 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1082.

We understand that the Company may amend the Plan to cease benefit accruals but that accruals for purposes of vesting will continue. Of course, any such amendment must comply with the requirements of ERISA and the Code.

Sincerely
Henry Rose
General Counsel

PENSION BENEFIT GUARANTY CORPORATION

77-132

FEBRUARY 18, 1977

REFERENCE:
4047 Restoration of Plans

OPINION:

This is in response to your letter requesting that the Pension Benefit Guaranty Corporation (the "PBGC") consider a proposed alternative to termination of * * * (the "Plan"), which would involve a restoration of the Plan on a curtailed basis. This also will serve to acknowledge receipt of the Notice of Intent to Terminate the Plan (the "Termination Notice"), which was received by the PBGC with your letter on * * *, proposing a termination date of December 31 1976.[1]

As we understand the pertinent facts, the Plan was adopted, effective * * *, by * * * (the 'Company") and its affiliate, * * *.[2] The Plan has insufficient assets to pay all guaranteed benefits under the Plan. Although the Company, as plan administrator, has submitted a Termination Notice for the Plan, the Company expressed a willingness to continue the Plan,

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[1]We should note that Section 4041(a) of the Employee Retirement Income Security Act of 1974 (the "Act") requires that a Notice of Intent to Terminate be filed with the PBGC at least 10 days before the proposed date of termination. A Notice of Intent to Terminate is deemed to have been filed on the date on which it is received by the PBGC. 29 C.F.R. § 2604.5 (1976).

[2]We will assume, for the purposes of this letter, that the Plan actually is one pension plan. That is, we will assume that benefits under the Plan are not payable with respect to each participant only to the extent of the Plan assets attributable to the employer who employed that participant. Rather, all Plan assets are available to pay all benefits under the Plan. But see, Plan, Article 13.1.

subject to the adoption of a Plan amendment, effective as of January 1, 1976, which would provide, as follows:

1) Benefit accruals under the Plan will cease as of January 1, 1976;

2) No employee will be eligible to become a participant in the Plan after December 31, 1975;

3) The Company will contribute to the Plan in accordance with the requirements of Section 412 of the Internal Revenue Code;

4) Each bargaining unit member will be afforded the opportunity to elect to receive a lump-sum payment of his or her accrued benefit under the Plan as of December 31, 1975, which will be considered to be 100% vested to the extent of Plan assets allocable to such benefit as of December 31, 1976; each bargaining unit member who so elects would be required to execute a form under which that participant waives any claim he or she might have to "future benefits" under the Plan or Title IV of the Act;

5) Participants who do not receive a lump-sum payment, pursuant to paragraph 4, will continue to receive credited service in accordance with the "elapsed time system."

The proposed amendment also will make other changes in the Plan so that the Plan will comply with the Act.

You asked whether the PBGC will permit the Plan to be restored on a curtailed basis in accordance with the above-mentioned proposed Plan amendment should the Company request that it be allowed to withdraw the Termination Notice, and, if not, what adjustments would have to be made for the PBGC to permit a withdrawal. The PBGC will permit the Plan to be restored if certain adjustments are made in the proposal. The proposed Plan amendment should be revised so that no

employee will be eligible to become a participant in the Plan after December 31, 1976, benefit accruals will cease after December 31, 1976, and paragraph 4 is deleted, *i.e.*, the Plan is not amended so as to afford bargaining unit members the opportunity to elect to receive a lump-sum payment of any amount (the "Revised Proposed Plan Amendment"). The adoption of the Revised Proposed Plan Amendment will not result in the imposition of employer liability under the Act.

Some of these changes in the proposal are necessary because of the PBGC's policy not to agree to a withdrawal of a termination notice where it results in prejudice to the PBGC or to participants or others. *See generally*, PBGC, Guidelines on Voluntary Termination, Publication No. 503 (January, 1977). The PBGC will not exercise its discretionary authority under Section 4047 of the Act and permit the Termination Notice to be withdrawn in a situation such as this where an employer seeks retroactively to cease benefit accruals as of a date one year or more prior to the termination date since it would appear that the PBGC's action under such circumstances would not be in the best interests of Plan participants. It also is not clear that Section 4047 authorizes the PBGC to take such action. The other changes in the proposal are necessary because the PBGC will not permit a restoration where the employer intends to offer participants the opportunity to elect to receive a lump-sum payment of an amount less than their guaranteed benefit under Title IV.

Should you wish to pursue this matter any further, please contact * * * of my staff at * * * or at the above address.

Sincerely
Henry Rose
General Counsel

Excerpt from:

IOD/LD SEPPAA Trusteeship Working Group Minutes Of Monday, December 15, 1986.

* * *

7. Mike Wells, Associate Director, IOD, presented an overview of LTV's financial situation with a concentration on its Steel Divisions. Mr. Wells represented that the probability that LTV can survive with the Plans intact is "de minimis."

* * *

Excerpt from:

IOD/LD SEPPAA Trusteeship Working Group Minutes Of Thursday, December 18, 1986

2. The group reviewed the status of the action items established at the previous meeting: ...

b. Robert Klein presented an analysis of LTV's ability to make ongoing contributions to the Plans. His conclusion was that LTV could not afford to maintain the Plans under their own optimistic projections. Bob felt that LTV's assumptions concerning the steel industry are reasonable; however, their assumptions concerning LTV's projections are optimistic. Bob submitted a memorandum to the group indicating that a projected cash flow of $300 million per year together with a planned cash build-up of just over $1 billion by the end of 1988 would not be sufficient to finance a plan of reorganization and the ongoing Plans. The group thus concluded that termination would occur; the relevant question was whether it would be now or later.